

No. 15,104  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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ORIENTAL FOODS, INC.,

*Appellant,*

*vs.*

CHUN KING SALES, INC. and JENO F. PAULUCCI,

*Appellees.*

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CHUN KING SALES, INC. and JENO F. PAULUCCI,

*Appellants,*

*vs.*

ORIENTAL FOODS, INC.,

*Appellee.*

---

**Answering Brief of Defendant-Appellee  
Oriental Foods, Inc.**

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## Answering Brief of Defendant-Appellee Oriental Foods, Inc.

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### I.

#### Introduction.

This is the answer on behalf of defendant-appellee Oriental Foods, Inc. (hereafter referred to as “defendant” or “Oriental”) to the “Opening Brief of Plaintiffs-Appellees-Appellants” Chun King Sales, Inc., and Jeno F. Paulucci (hereafter jointly referred to as “plaintiffs” or “Chun King”) in the appeal by Chun King from that portion of the judgment in this action relating to the claim for unfair competition.

## II.

### Counter-Statement of the Case.

#### A. Introduction.

The statement of the case made by Chun King in its opening brief is both incorrect and argumentative. The findings of fact and opinion of the trial court set out what was and was not *established* by Chun King. Plaintiffs' statement of the case merely set out that which Chun King *attempted* to establish at the trial.

#### B. The Issue.

The claim of unfair competition is based on alleged patterning by Oriental of the general dress, style, arrangement and appearance of the *combination units of two or more cans* of Oriental-type foods sold by Chun King, said patterning being allegedly for the purpose of deceiving the purchasing public [Complaint, Par. XVI, R. 8]. This is the only issue.

Although the Complaint alleges confusion by the public of the products of defendant with those of plaintiffs [Complaint, Par. XVII, R. 9], there was no evidence of any confusion whatever and the District Court so found as a fact [Finding 25, R. 87], and plaintiffs have not charged this finding to be erroneous. Consequently, the presence or lack of confusion is not an issue in this appeal. Plaintiffs' brief (p. 17) admits that *there is not even any evidence of any likelihood of confusion*.

Similarly, although the Complaint alleges that Chun King has been damaged by Oriental's alleged unfair competition [Pars. XVIII and XIX, R. 9-10], this was denied by defendant [Answer, Pars. XVIII and XIX, R. 16], there was no evidence of any damage to plaintiffs, and

the District Court made no finding with respect thereto. Consequently, this is not an issue.

There is no allegation in the Complaint that the purchasing public has ever come to identify Chun King's labels or any of the features thereof, or the color coding of its cartons, with Chun King, there was no evidence thereof, and there is no issue with respect thereto. The District Court expressly held that plaintiffs' labels have not become identified by the public with Chun King [Opinion, R. 80].

Plaintiffs use and prominently display on their products their trademark "Chun King," and Oriental uses and prominently displays on its products its trademark "Jan-U-Wine." There is no charge by plaintiffs of any trademark infringement, and plaintiffs' brief admits that this is not an issue in this case (p. 10).

The sole issue here is whether defendant has unfairly competed with plaintiffs. The District Court entered adequate findings of fact on this issue [Findings 25-31, R. 87-88]. Thus, the burden is on Chun King to establish that such findings of fact are "clearly erroneous" as required by Rule 52(a) of the Rules of Civil Procedure. Chun King has obviously failed to carry this burden.

### **C. Plaintiffs' Specifications of Error.**

Chun King's Specification of Error No. 9 does not correctly state the basis of the District Court's ruling, because the District Court did consider the makeup and combination of figures, script and coloring of the labels. Findings of Fact 27, 28 and 29 [R. 87] establish that the District Court considered the combination of colors, vignettes and words, the lettering, script, scrolls, and symbols and

the “*tout ensemble*” of the labels in finding that there was no simulation by Oriental and no confusing similarity between the labels of the parties. This consideration by the District Court is elaborated on at length in its Opinion [R. 74-81].

The Specification of Error No. 10 is also incorrect in that there is no finding and the record does not prove that “defendant by plan followed precisely the change and changing of labels of the plaintiffs” nor that defendant Oriental “brought out labels for its cans in precise duplication of the labels of the plaintiffs.” This specification of error is merely argumentative.

#### **D. The Facts.**

The chronological summary of Oriental’s business set out in Chun King’s Opening Brief has certain significant omissions. Therefore, the following statements are included to supplement the summary made in said Opening Brief.

Oriental has been merchandising Oriental-American foods in combination deals since 1935 [R. 499-500]. A “one-cent sale” sales promotion campaign was initiated by Oriental in June of 1949 [R. 252, 473-477; Exs. AE-1, AE-2, R. 680-683]. This sales campaign featured two cans taped together in end-to-end relation [R. 270-272]. There is no evidence that defendant copied plaintiffs in this selling practice.

Oriental first employed color codes on cartons to identify the contents of the cartons in the nineteen thirties [R. 483]. Starting in October, 1949, with the bean sprout cartons, Exhibit AF [R. 483], Oriental color coded all of its cartons as exemplified by Exhibit AG [R. 484-485].



In April, 1952, another change in carton design was initiated as exemplified by Exhibits AH and AI [R. 486]. The cartons for all of the products in the line were changed to correspond to Exhibits AH and AI, the most recent change occurring in September, 1955, with the mushroom chow mein carton [R. 268-271; Exs. 45, 34, 46, 47]. The earliest date claimed by plaintiffs' brief (p. 6) for the color-coding of cartons by Chun King is 1954. Thus, defendant had been color-coding its cartons for *many* years before Chun King started the practice.

Oriental used labels with vignettes to illustrate the contents of the can bearing the label in 1927 [R. 487]. The label, Exhibit AJ, is of the type first used in 1935 [R. 487-488]. The label, Exhibit AK, is of the type first used in 1948 [R. 488]. The labels, Exhibits AL-1 and AL-2, are of the type first used in February-April, 1950 [R. 489]. The labels, Exhibits AM-1, AM-2 and AM-3, are of the type first used in October, 1953 [R. 490]. Plaintiffs' Brief makes no contention that Chun King was the first to use vignettes of the contents on its cans, nor does it make any statement as to when Chun King first started to do so. The evidence is clear, however, that Oriental was the first to use such vignettes and that its use thereof progressed through a natural development from its own beginnings.

Oriental started to color-code its labels to indicate the contents of its cans between 1947 and 1949, as admitted by Plaintiffs' Brief (p. 7). This has continued to the present, through a number of changes in the format of the labels [R. 254-257]. There is no contention in Plaintiffs' Brief that Chun King has ever color-coded its labels, and there is no evidence to support such a contention.

It is to be noted that plaintiffs have limited their claim of label copying by the defendant to the year 1951 and subsequently [R. 240].

The District Court recognized in its Opinion that as to each of the significant distinctive identifying symbols defendant's use thereof preceded use by Chun King [R. 75, 81].

### III.

#### **The Argument.**

##### **A. Introduction.**

The Plaintiffs' Brief makes no attempt to show that any of the findings of fact of the District Court are erroneous, much less that they are clearly erroneous, as required by Rule 52(a) of the Rules of Civil Procedure. In fact, Plaintiffs' Brief does not mention the findings of fact except to say baldly that they were erroneous in its "Specification of Errors" (pp. 4-5). This, we suggest, does not comply with Rule 52(a) and the judgment in defendant's favor on the unfair competition issues should be affirmed on this ground alone.

Plaintiffs' Brief merely charges copying by defendant and speculates on the possibility of confusion. There is no evidence either of copying or the likelihood of confusion. In fact, the defendant was first in the field with all of the significant features of the labels and cartons, as pointed out by the District Court [R. 75, 81]. Plaintiffs' Brief (p. 17) admits the lack of any evidence as to the likelihood of confusion.

## B. Lack of Similarity of Labels.

A comparison of the labels of the parties clearly establishes that the labels are not confusingly similar and that there is no likelihood of confusion as to source.

The trademarks "Jan-U-Wine" and "Chun King," which are the dominant elements of the labels, are totally dissimilar, one being in conventional type and the other utilizing brush lines suggestive of Chinese writing. A dish of chop suey looks like a dish of chop suey, regardless of who employs its picture on the label. Textual material describing the contents of the cans and the manner of preparation of the food necessarily utilizes the same words, since both parties are selling the same products. The dominant use of their trademarks alone is clearly sufficient to distinguish the products of the parties.

The chronological review of the development of the labels and cartons of both parties, as set forth in Plaintiffs' Brief (pp. 6-7) and hereinabove (II(D)), clearly establishes that the defendant was first in the field with all of the dominant features questioned. It establishes: that defendant's labels and cartons were all logical commercial developments from its early labels and cartons, used by it long before 1951, which is the earliest date of copying claimed by plaintiffs [R. 240]; and that defendant's labels and cartons evolved without respect to the activities of Chun King. Copying was flatly denied by defendant's executive vice-president Mr. Hyun [R. 491].

The defendant was the first in its industry to use colors to identify its products [R. 255]. Defendant used vignettes of the contents of its cans on its labels as early as 1927 [R. 487-491] and in 1949 [R. 256], which was much earlier than any alleged use thereof by Chun King.

Defendant has color-coded its cartons to indicate the contents since 1949 [R. 483-487], again much earlier than Chun King, the plaintiffs' earliest use thereof shown in the evidence is in March, 1954 [R. 275].

If there were any basis for a claim of unfair competition by reason of any similarities in the features of the labels and cartons of the parties, Oriental would have such a claim against Chun King, not the reverse. No such claim is urged here by Oriental, other than by way of defense against the wholly unfounded contentions of Chun King.

**C. The District Court Properly Stated and Applied the Law.**

Plaintiffs' Brief (p. 10) charges that the District Court fell into error by disregarding the so-called indiscriminating prospective purchaser and confining its inquiry to buyers looking for brand names. We suggest that plaintiffs wholly misinterpret the Opinion of the District Court and that there is no basis for such a contention.

The District Court attempted to put itself in the position of the average buyer, saying:

"But, in determining likelihood to create confusion, the cases just cited teach that the tout ensemble of the article *as it appears to the average buyer* is to be considered" [R. 75].

"Where, as here, there is no evidence of actual confusion, the Court, in determining the likelihood of confusion, must attempt to 'approximate the position of an *ordinary purchaser*' " [R. 77].

Thus, there is no basis for such contention by the plaintiffs, as the District Court properly considered the evidence from the position of the average buyer.

Plaintiffs' Brief (p. 10) then goes on to assert that the District Court "in effect holds that no matter how similar the dress of the goods there is no unfair competition where the trademarks are different." Nothing could be further from the fact. The District Court considered at length the question of alleged similarities of dress apart from the trademarks of the parties, and held that "there is no confusing similarity here" [R. 74-81].

It must be remembered that there is no evidence here that the dress of plaintiffs' goods had in any way become identified in the mind of the public with Chun King, and the District Court held that ". . . plaintiffs' method of packaging or labelling has not become identified in the eyes of purchasers of Chinese foods with the plaintiffs' product" [R. 80]. Thus, as pointed out by the District Court, the dress of plaintiffs' goods has acquired no secondary meaning to the public. In the absence of such secondary meaning Chun King has no property right which is subject to protection.

The courts are quick to protect an established business against the inroads of a newcomer who copies the dress of the goods of the established business. That was the situation in all of the cases cited and quoted in Plaintiffs' Brief (pp. 10-16). That, however, is not the situation in the present case. As admitted in Plaintiffs' Brief (p. 6), Oriental was organized in 1928 and since has been engaged in canning and selling Chinese food, yet Chun King did not enter the field until May, 1947. Thus, here Oriental was the "first comer" and Chun King was the "late comer." Furthermore, Oriental was the first to use many of the label and carton features in contention here, as was so held by the District Court's Opinion [R. 75, 81]. Therefore, all of the cases cited in Plaintiffs' Brief

are clearly distinguishable from the situation in the present case and have no application here.

We submit that the District Court correctly stated and applied the law of unfair competition as it relates to the facts of the present case.

#### IV.

#### Conclusion.

This is an unfair competition action in which there is no evidence of confusion or likelihood of confusion between the labels and cartons of the defendant Oriental and those of the plaintiffs Chun King, and no evidence of any damage or injury to the plaintiffs.

Plaintiffs have not shown, or even alleged, any factual basis for any possible confusion by the public between the labels and cartons of the parties.

The District Court entered findings of fact fully supporting its judgment in favor of defendant, and plaintiffs have not shown that such findings are clearly, or otherwise, erroneous. In fact, we submit, plaintiffs have not even cast any doubt upon the correctness of the findings of fact.

We submit that the judgment in favor of the defendant on the unfair competition issues should be affirmed, with costs to the appellee Oriental.

Dated: February 7, 1957.

Respectfully submitted,

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